

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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FEB 17 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0226-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TRAVIS OAKES WATSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072936

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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By Brick P. Storts, III

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Attorneys for Petitioner

K E L L Y, Judge.

¶1 Pursuant to a plea agreement, petitioner Travis Watson pled guilty in March 2008 to possessing methamphetamine, a dangerous drug, for sale. He pled guilty simultaneously to five other offenses—three felonies and two misdemeanors—charged under five separate cause numbers. He also admitted having previously been convicted of a felony and having committed one of the recent offenses while released from custody on another of the offenses. At a consolidated sentencing hearing in May 2008, the trial court imposed concurrent, enhanced sentences for Watson’s four felony convictions, the longest of which was the aggravated, 13.75-year prison term imposed for the conviction in this case.

¶2 Watson then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging in his petition that trial counsel had rendered ineffective assistance at sentencing. Watson, who is infected with hepatitis C, contended counsel had inappropriately advocated for a mitigated, six-year prison term instead of a more realistic sentence of 9.25 to 10.5 years in prison and had “amazingly” failed to provide the court with specific information about Watson’s hepatitis C or to argue the relevance of Watson’s “actual condition, his prognosis in general, or his treatment while in prison with the disease.” The trial court dismissed the petition without a hearing, finding Watson had not stated a colorable claim of either deficient performance by counsel or resulting prejudice, *see Strickland v. Washington*, 466 U.S. 668, 692 (1984), and therefore was not entitled to an evidentiary hearing. *See Ariz. R. Crim. P. 32.6(c)*.

¶3 Watson filed the present petition for review in July 2009, challenging the trial court’s ruling on only the second of the two allegations of ineffectiveness raised

below. In September, he moved the trial court for leave to expand the record on review and “amend his previously filed Petition for Post-Conviction Relief, with additional factual information regarding treatment of prison inmates that suffer from Hepatitis C genotype 1A, as [does] Defendant.” The court permitted the amendment, considered the additional information Watson submitted, and ultimately ratified its order of May 26, 2009, dismissing the petition for post-conviction relief. Again the court explained the basis for its ruling in a detailed minute entry.

¶4 Watson then moved for reconsideration, contending the court had failed to give “due weight” to the progressive, serious, and allegedly fatal nature of his hepatitis C and asking the court to vacate his aggravated sentence and resentence him. The court denied the motion to reconsider in a minute entry of December 4, 2009, which states:

The Court has reviewed the Motion to Reconsider.

IT IS HEREBY ORDERED denying the Motion. The bottom line is that even assuming an evidentiary hearing bore out that the Defendant has a bad form of Hepatitis C, that his condition will worsen in prison and that he will not get treatment for Hepatitis C in prison, the sentence imposed by the Court would be no different than the one it imposed.

The Court therefore declines to reconsider its ruling.

This court granted Watson’s request for leave to supplement his petition for review to include the “expanded record and argument” from the additional proceedings that transpired below after Watson had filed the petition for review. We now review the trial court’s rulings, which we will not disturb unless we find it has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶5 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland*, 466 U.S. at 691-92; *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6, 32.8. A colorable claim is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶6 Here, the trial court determined that Watson had failed to colorably allege trial counsel's performance was substandard and had further failed to demonstrate prejudice. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (even if counsel's performance deficient, ineffective assistance claim fails if outcome unaffected). In the clearest possible terms, the court stated repeatedly that, even assuming the truth of all the information Watson submitted in these post-conviction proceedings and assuming *arguendo* the court had been unaware of Watson's medical condition and prognosis at sentencing, after considering all of Watson's supplemental information, the court would still impose today exactly the same aggravated prison term it imposed at sentencing in May 2008. In short, Watson is unable to demonstrate any prejudice resulting from counsel's performance, however that performance is characterized.

¶7 Watson’s argument suggests he believes the trial court was essentially obliged to impose a shorter prison term in light of his medical condition. But “trial courts have broad discretion in sentencing convicted defendants. If a sentence is within statutory limits, it will not be modified or reduced unless . . . it clearly appears the sentence was an abuse of the trial court’s discretion.” *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). “In determining punishment, the court should consider not only the circumstances of the offense but also the character and past conduct of a defendant.” *State v. Thurlow*, 148 Ariz. 16, 18, 712 P.2d 929, 931 (1986).

¶8 The trial court’s determination here that it would have imposed the same sentence even with the information Watson subsequently presented was singularly its decision to make, and imposing an aggravated sentence was within the bounds of the court’s broad discretion. *See Thurlow*, 148 Ariz. at 19, 712 P.2d at 932 (“[T]he ultimate responsibility for fitting the punishment to the circumstances of the particular crime and individual defendant still rests with the judiciary.”). The court was not required to find that mitigating factors existed or outweighed the aggravating factors the court had found; it was only required to consider all relevant information presented before making its decision. *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.2d 355, 357 (App. 2003); *State v. Carbajal*, 177 Ariz. 461, 463, 868 P.2d 1044, 1046 (App. 1994). The court plainly did this, and we cannot say it abused its discretion, either in imposing the aggravated, 13.75-year prison term initially or in ratifying its sentencing decision after finding Watson had failed to present a colorable claim of ineffective assistance of counsel.

¶9 Accordingly, finding no basis for disturbing the trial court’s ruling, we grant the petition for review but deny relief.

VIRGINIA C. KELLY, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PHILIP G. ESPINOSA, Presiding Judge